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NO. ———

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

TEXAS LIQUOR CONTROL BOARD, ET AL.,
Petitioners,

v.

AMMEX WAREHOUSE COMPANY, INC., ET AL.,
Respondents.

From the
Court of Civil Appeals for
The Third Supreme Judicial District of Texas
At Austin

PETITION FOR CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners, the Texas Liquor Control Board and Coke R. Stevenson, Jr., Administrator of the Texas Liquor Control Act, respectfully request that this Court grant certiorari to review the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, affirming the judgment of the 53rd District Court of Travis County, Texas, which held to be unconstitutional a statute amending the Texas Liquor Control Act.

THE OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin is styled *Texas Liquor Control Board, et al., Appellants v. Ammex Warehouse Company, Inc., et al., Appellees,* and is reported, 384 S.W.2d 768, and is appended hereto, Appendix, p. 41, et seq.

The final judgment of the 53rd District Court of Travis County, Texas, which formed the basis of the appellate opinion noted above was numbered and styled Consolidated Cause No. 132,400, Ammex Warehouse Company, Inc., et al. v. Texas Liquor Control Board, et al., and is appended hereto, Appendix, p. 53, et seq.

THE GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

I.

CHRONOLOGY

The decision of the Court of Civil Appeals for the Third Supreme Judicial District of Texas from which appeal is here taken is dated December 2, 1964 (Appendix, p. 41, et seq.).

Appellants' motion for rehearing, duly filed on December 9, 1964, was by the Court of Civil Appeals for the Third Supreme Judicial District overruled on December 16, 1964, as certified by the Clerk of the Court of Civil Appeals.

Application for Writ of Error to the Supreme Court of the State of Texas was timely filed on January 15, 1965, as certified by the Clerk of the Supreme Court of the State of Texas.

The Supreme Court of the State of Texas refused the application for writ of error, with the notation "no reversible error," on June 23, 1965, as certified by the Clerk of the Supreme Court of the State of Texas.

Motion for rehearing on the application for writ of error was by the Supreme Court of the State of Texas overruled on July 28, 1965, as certified by the Clerk of the Supreme Court of the State of Texas.

II.

STATUTORY PROVISION CONFERRING JURISDICTION

The jurisdiction of this Court is here sought under 28 U.S.C.A. 1257(3), which authorizes this Court to exercise jurisdiction "by writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States."

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition for certiorari pertain to the right of the State of Texas under the Twenty-First Amendment to the Constitution of the United States, the Wilson Act (27 U.S.C.A. 121), the Webb-Kenyon Act (27 U.S.C.A. 122), and the Federal Alcohol Administration Act (27 U.S.C.A. 201, et seq.) to regulate the business of selling, in less than wholesale quantities, alcoholic beverages, tax free, from United States Government Bonded Warehouses and the extent, if any, to which the Export-Import Clause

of the United States Constitution (Article I, Sec. 8, Cl. 2), the Commerce Clause of the United States Constitution (Article I, Sec. 8, Cl. 3), the Supremacy Clause of the United States Constitution (Article VI, Cl. 2), or Federal statutes or regulations enacted pursuant thereto deprive the State of Texas of authority to regulate such business. The questions are:

(1) Does there exist any conflict between any of the above noted provisions of the Constitution of the United States, or Federal statutes or regulations enacted pursuant thereto, and Article 667-15(7b), Vernon's Annotated Penal Code of the State of Texas, so as to render the Texas statute unconstitutional?

(2) Does the State of Texas have the authority to require that persons and corporations holding federally issued basic importer's permits under 27 U.S.C.A. 204 and engaged in the State of Texas in the business of selling tax free liquor from United States Government Bonded Warehouses, Class 2 and 8, authorized under 19 U.S.C.A. 1555 and 1562, to secure, in addition to such Federal authorization, permits established by Texas law to be issued by the Texas Liquor Control Board?

(3) Does the State of Texas, in order to prevent unlawful diversion within the State of Texas, have the authority to require that liquor sold tax free purportedly for exportation actually be exported in compliance with Federal regulation?

(4) Where the admitted and undisputed facts show conclusively that the Class 8 United States Customs Bonded Warehouses maintained by the liquor sellers in Texas are being operated in violation of the con-

trolling Federal statute, 19 U.S.C.A. 1562, and the applicable Customs regulations as construed by the Court of Customs and Patent Appeals, there being no United States Supreme Court decision directly interpreting that statute, do the liquor sellers have the right to claim Federal protection from State regulation or does the State of Texas have the authority to regulate the business of the liquor sellers in order to prevent the unlawful diversion of the tax-free liquor within the State of Texas?

(5) Did the Court of Civil Appeals for the Third Supreme Judicial District of Texas, and, by inference from its refusal of application for writ of error with "no reversible error" annotation, the Supreme Court of the State of Texas correctly interpret the decisions of the United States Supreme Court in *Hostetter v. Idlewild Bon-Voyage Liquor Corporation,* 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed. 2d 350 (1964), and *Department of Alcoholic Beverage Control for the State of California et al. v. Ammex Warehouse Company of San Ysidro, Inc.,* 378 U.S. 124, 84 S. Ct. 1657, 12 L.Ed. 2d 743 (1964), as prohibiting the State of Texas from regulating, as the State of Texas has attempted to do by enactment of Article 666-15(7b), Vernon's Annotated Penal Code, businesses similar to those involved in the reported cases, where not only is the law of Texas entirely different from the state laws in the reported cases, but the businesses themselves also differ from those involved in the reported cases in the types of Customs Bonded Warehouses maintained, in various operational procedures, in places of delivery, and in legislative recognition of need for regulation?

(6) Should a state statute regulatory of an aspect

of the liquor industry be declared unconstitutional on the ground that the business constitutes foreign commerce authorized by Federal law and compliance with the statute is "impossible" when (a) there is no competent evidence that compliance is in fact impossible, and (b) the business is conducted totally and entirely within the State of Texas?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I.

THE TEXAS STATUTE IN QUESTION

The statute in question, an amendment to the Texas Liquor Control Act, was enacted in 1963 by the 58th Legislature of the State of Texas (General and Special Laws of the State of Texas passed by the Regular Session of the Fifty-Eighth Legislature, 1963, Ch. 108, p. 196) and is codified as Article 666-15(7b), Vernon's Annotated Penal Code of the State of Texas. The measure, as enacted, reads:

"H.B. No. 782

"An Act amending Chapter 467, House Bill No. 77, Second Called Session, Forty-fourth Legislature, as such has been heretofore amended, being the Texas Liquor Control Act, and being the Act carried in Vernon's Penal Code as Article 666 and 667, by adding to Section 15 of Article I a new paragraph to be designated (7b) to provide for a United States Bonded Liquor Export Permit authorizing the holder thereof to engage in the business of importing, transporting, and ware-

housing United States bonded liquor and the exporting of the same in less than wholesale quantities; defining the authority of such permit holders; setting the fee for such permits; providing that the authority granted to such permit holders is cumulative of and not in lieu of requirements of Federal Law in the conduct of such operations; specifying that such permits shall not be required of the holder of any other type of permit which, under the Texas Liquor Control Act and the rules and regulations of the Texas Liquor Control Board, authorizes the exportation of liquor in compliance with the requirements of Federal Law; authorizing those who on the effective date of the Act are engaged in the business of exporting United States bonded liquor from the United States to continue to engage in such operations until their applications for permits under this Act have been acted upon provided such applications are filed within thirty (30) days after the effective date of this Act; providing for severability; and declaring an emergency.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

"Section 1. Section 15 of Article I of the Texas Liquor Control Act is hereby amended by the addition of a new paragraph to be designated (7b), reading as set out herein:

"(7b) United States Bonded Liquor Export Permit. A United States Bonded Liquor Export Permit shall authorize the holder thereof to:

"(a) Purchase liquor in bond from holders of Texas Wholesalers' Permits or purchase liquor from distillers, brewers, wineries, wine bottlers, rectifiers, and manufacturers who are holders of Nonresident Sellers' Permits and import into the State of Texas at a United States bonded dock such liquor in transit for exportation purposes.

"(b) Transport such liquor from the United States bonded dock at point of entry under United States bond to a United States bonded warehouse within the State of Texas.

"(c) Warehouse such liquor under United States bond.

"(d) For the purpose of exportation only, solicit orders for, take orders for, and accept payment for any quantity of said liquor in unbroken original containers.

"(e) Cause such liquor to be withdrawn from a United States bonded warehouse for exportation, in compliance with United States Custom regulations, and delivered to a public common carrier for transportation, in compliance with such carrier's established rate schedule, into the country of export by such common carrier or by such common carrier's affiliated common carrier in the country of export, for delivery to the purchaser at a designated address outside the continental limits of the United States or for delivery to a named qualified person at a designated address outside the continental limits of the United States.

"The annual state fee for a United States Bonded Liquor Export Permit shall be Seven Hundred and Fifty Dollars ($750).

"The privileges authorized by this Section are cumulative and not in lieu of requirements of Federal law in the conduct of such operations. It is specifically provided, however, that permits under this Section shall not be required for the wholesale export of United States bonded liquor by the holder of any other type of permit which, under existing statutes and the rules and regulations of the Texas Liquor Control Board, authorizes the wholesale exportation of liquor in compliance with Federal Law.

"Sec. 2. Any person who, on the effective date of this Act, is engaged in the business of exporting bonded liquor from the United States in compliance with Federal regulations may continue to engage in such operation until his application for a permit under this Act has been acted upon, provided, however, that such application is filed within thirty (30) days after the effective date of this Act.

"Sec. 3. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provisions or applications, and to this end the provisions of this Act are declared to be severable.

"Sec. 4. The fact that there is an urgent need to amend the Texas Liquor Control Act to bring within the scope of State regulatory authority the judicially declared legitimate business of exporting United States bonded liquor in less than wholesale quantities, together with the further fact that liquor is presently being sold in the State of Texas for exportation in violation of the laws of this State, that the State of Texas is receiving no tax revenue from such sales, and that Texas has an extensive international boundary along which the sale of liquor can be effectively regulated and controlled for the benefit of the people of the State of Texas only by requiring all persons engaged in any legitimate phase of the liquor industry to hold permits or licenses issued by this State through the Liquor Control Board, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

"Passed the House, April 4, 1963, by a non-record vote; passed the Senate May 2, 1963, by a viva-voce vote.

"Approved May 7, 1963.

"Effective 90 days after date of adjournment."

II.

PROVISIONS RELIED UPON BY PETITIONERS

The authority of the State of Texas so to regulate an aspect of the liquor industry within its borders is, Petitioners submit, established by Section 2 of the Twenty-First Amendment to the Constitution of the United States, which reads:

> "Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Petitioners also rely upon the Wilson Act (27 U.S.C.A. 121), which specifies:

> "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The Webb-Kenyon Act (27 U.S.C.A. 122) contains similar but even more specific state authorization. It reads:

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The Federal Alcohol Administration Act (27 U.S.C.A. 201, et seq.), in its entirety, recognizes the peculiar right of states to regulate all aspects of the alcoholic beverage industry conducted within the boundaries of the states. Of particular significance here is that portion of the Act relating to the issuance of permits and reading (27 U.S.C.A. 204):

> "(a) Who entitled thereto. The following persons shall, on application therefor, be entitled to a basic permit:
>
> "(1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

"(2) Any other person unless the Secretary of the Treasury finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal Law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal Law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted."

III.

PROVISIONS UPON THE BASIS OF WHICH TEXAS COURTS RULED THE STATUTE IN QUESTION UNCONSTITUTIONAL

The Texas statute has been held to be in violation of the Export-Import Clause, the Commerce Clause, and the Supremacy Clause of the Constitution of the United States, Article I, Section 8, Clauses 2 and 3, and Article VI, Clause 2:

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

* * *

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

IV.

OTHER STATUTES AND REGULATIONS INVOLVED

The Respondent liquor sellers in Texas maintain Class 2 and 8 United States Customs Bonded Warehouses authorized by 19 U.S.C.A. 1555 and 19 U.S.C.A. 1562 and subject to the provisions of the Title 19, Code of Federal Regulations, Customs Regulations, Part 19, Sections 19.1 and 19.11, CR. 379-381 and CR 386-387. The statutes and regulations are set out in the Appendix, p. 57, et seq.

Those selling liquor for export in New York and California, involved in *Hostetter v. Idlewild Bon-Voyage Liquor Corporation*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964), and *Department of Alcoholic Beverage Control for the State of California v. Ammex Warehouse Company of San Ysidro, Inc.*, 378 U.S. 124, 84 S.Ct. 1657, 12 L.Ed.2d 743 (1964), operated from Class 6 United States Customs Bonded

Warehouses authorized under 19 U.S.C.A. 1311 and subject to the provisions of the Title 19, Code of Federal Regulations, Customs Regulations, Part 19, Section 19.13, CR 387-388. The statute and regulation are set out in the Appendix, p. 63, et seq.

The Texas statute in question, as noted above, authorizes permit holders "in compliance with United States Customs Regulations," to withdraw liquor from the warehouse and to deliver it to a common carrier for transportation to the country of export. The Texas statute, thus, incorporates not only the Federal statutes and regulations applicable to the type warehouse for which a liquor seller qualifies but also the definition of "common carrier" as set out in Title 19, Code of Federal Regulations, Customs Regulations, Part 18, Section 18.1, CR 363, set out in the Appendix, p. 70, and Section (a), subsection (5) of 49 U.S.C.A. 1002, which is incorporated by reference in the Customs Regulation definition and which is set out in the Appendix, p. 72.

Respondent liquor sellers assert that the procedure which they follow in Texas constitutes exportation of the liquor in compliance with Federal regulations. Petitioners dispute that contention upon the basis of the definition of "exportation," Title 26, Code of Federal Regulations, Part 252, Exportation of Liquors, Subpart B, § 252.11, quoted in Appendix, p. 74, and the specified "evidence of exportation," Title 26, Code of Federal Regulations, Part 252, Exportation of Liquors, Subpart B, § 252.40, quoted in Appendix, p. 75.

STATEMENT OF THE CASE

The specific question in this case is the constitution-

ality of Article 666-15(7b), Vernon's Annotated Penal Code of the State of Texas (Acts 1963, 58th Leg., Ch. 108, p. 196, quoted in full above). The statute, as it shows on its face, is an amendment to the Texas Liquor Control Act. It establishes a permit for those engaged in selling liquor for export from United States Customs Bonded Warehouses and provides for such businesses regulations identical to or comparable with those applicable to all other aspects of the alcoholic beverage industry in the State of Texas. The statute was enacted after the three-judge Federal court in *Idlewild Bon-Voyage Liquor Corporation v. Epstein,* 212 F.Supp. 376 (D.C., S.D.N.Y., 1962), held that the State of New York *could regulate* but could not constitutionally prohibit a business similar to, but not identical with, those then being operated in Texas towns along the Mexican border. It had initially been the position of the State of Texas, as it was New York's position in the reported case, that the state could absolutely prohibit tax-free retail sales of liquor "for export."

Ammex Warehouse Company, Inc., a Respondent here, was the first of the "export" sellers in Texas. Hal G. Ward, founder of the company (S.F. 7, 14, 81) began operations in Laredo in June, 1961 (S.F. 10), under a wholesaler's permit provided in the Texas Liquor Control Act (Article 666-15(6), Vernon's Annotated Penal Code). Such permits authorize exportation of liquor but only in wholesale quantities (Articles 666-15 and 666-23a, Vernon's Annotated Penal Code). When it became apparent that Ammex was selling at retail, the Texas Liquor Control Board cancelled the permit.

Ammex appealed from the cancellation by filing suit

against the Board, Cause No. 123,485 in the 53rd District Court of Travis County (Tr. 344). At that time the Texas Liquor Control Act provided no permit applicable to the type of operations being conducted by Ammex, and the trial court held that the Act could not constitutionally be applied to the business and issued an injunction prohibiting the Liquor Control Board, its officers and employees from in any manner interfering with the operations of the liquor seller (Tr. 359). The Texas situation was, therefore, at that time comparable with that which existed in New York at the time of the *Idlewild* case. The other liquor sellers who are Respondents here began operations after judgment was entered in the original Texas Ammex case (Tr. 16, 344).

Under those circumstances, the Texas Legislature accepted as correct the views expressed by the three-judge Federal court in New York and drafted the statute here in question to conform precisely with the operations which the Federal Court had held to be a legitimate business. Thereafter this Court, in *Hostetter v. Idlewild Bon-Voyage Liquor Corporation,* 377 U.S. 354, 84 S.Ct. 1293, 12 L. Ed. 2d 350 (1964), affirmed the lower Court's decision, also limiting its holding to the fact that New York was seeking absolutely to prohibit—not to regulate.

Before this Court's decision in the *Idlewild* case and before the effective date of the Texas statute, Respondents, seven firms who at that time were operating, in the six major Texas towns along the Mexican border, seventeen liquor selling establishments[1] of the

[1]Respondents are (1) Ammex Warehouse Company, Inc., operating seven sales establishments, two in Brownsville, two

precise type to which the statute was designed to apply, challenged the constitutionality of the statute, taking the position, again in the 53rd District Court of Travis County, Texas, that the State of Texas is completely lacking in power to regulate or control their businesses in any manner whatsoever.[2]

Federal questions were raised by all parties at the earliest possible opportunity. The Original Petition of Ammex Warehouse Company, Inc., the first of those who are Respondents here to file a suit attacking the validity of the statute, alleges in part (Tr. 6):

> ". . . The Twenty-first Amendment to the Constitution does not provide the State of Texas with the power it has attempted to assert over the busi-

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in Laredo, and one each in Hidalgo, Eagle Pass and El Paso; (2) Halem Ayoub and Sam Wardy, partners doing business as Ayoub & Wardy, with two sales establishments in El Paso; (3) Vicente Garza, Jr., and Jorge Garza, partners doing business as Vir Warehouse Company with sales establishments in Roma, Brownsville, and Laredo; (4) Albert Anzaldua, an individual doing business as Andy's Customs Bonded Warehouse with sales establishments in Laredo and Hidalgo; (5) Francisco C. Gonzalez and Cesar Salinas, partners doing business as G & S Bonded Warehouse with a sales establishment at Roma; (6) Sam Leland Glass, Sam Glass Pate, and Olin Earl Brashear, partners doing business as King's Mart Export Company with its sales establishment in Brownsville; and (7) Alfonso Casso, Raul Casso, Sr., and Raul Casso, Jr., and Mrs. Angelina C. San Martin, partners doing business as Border Bonded Warehouse in Laredo (Tr. 334-336).

[2]The case originated as five separate but substantially identical suits filed on behalf of the various liquor selling establishments. Each petition sought declaratory judgment holding the statute unconstitutional and permanent injunction prohibiting the Texas Liquor Control Board, its Administrator, agents, and employees from enforcing or attempting to enforce the new law. Separate temporary injunctions were issued (Tr. 185, 189, 219, 223), but the five cases were formally consoliated for trial on the merits (Tr. 290).

ness of Plaintiff by said House Bill 782, since the liquor handled by Plaintiff is not liquor which merely travels in interstate commerce, but all liquor handled by Plaintiff is, from beginning to end, in the stream of foreign commerce and is not intended for consumption or use within the State of Texas. The export business of Plaintiff is sanctioned, controlled, and protected by the Export-Import Clause of the United States Constitution (Art. I, Sec. 8, Cl. 2) and the Federal Statutes and Regulations enacted pursuant thereto; the Commerce Clause of the United States Constitution (Art. I, Sec. 8, Cl. 3), and the Supremacy Clause of the United States Constitution (Art. VI, Cl. 2), and any attempt to enforce the Texas Liquor Control Act, as amended, is violative of the above clauses of the United States Constitution. . . ."

Comparable allegations are contained in the original petitions filed in the same Court by the other liquor sellers who are Respondents here (Tr. 40-41, 54, 103, 133-134) and were repeated in all amended pleadings by all parties who are Respondents here (Tr. 198, 246, 281, 283).

The trial court adopted the contentions of the liquor sellers, ruling in final judgment in the consolidated cause that (Tr. 335 and Appendix, p. 54):

> "The Texas Liquor Control Act, as amended by House Bill 782, Acts of the 58th Leg. (1963) Ch. 108, p. 196, codified as Article 666-15(7b), Vernon's Annotated Penal Code, cannot constitutionally be applied to Plaintiffs so long as they are engaged in the 'in bond' liquor business which is hereinafter described."

The judgment of the trial court further granted, in conformity with the prayer of the liquor sellers, an

injunction permanently enjoining the Texas Liquor Control Board, its Administrator, agents, employees, representatives, and successors in office "from in anywise, directly or indirectly, interfering with, controlling or regulating any or all of the plaintiffs [Respondents here] . . . in the operation of their respective businesses anywhere in the State of Texas" (Tr. 335, Appendix, p. 55).

As they had done as Defendants in the trial court, Petitioners as Appellants in the Court of Civil Appeals for the Third Supreme Judicial District of Texas took the position that the statute in question, a regulatory measure, is authorized by the Twenty-First Amendment to the Constitution of the United States, the Wilson Act (27 U.S.C.A. 121), the Webb-Kenyon Act (27 U.S.C.A. 122), and the Federal Alcohol Administration Act (27 U.S.C.A. 201, et seq.). The brief in which those contentions are set out is a part of the record certified to by the Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of Texas and now before this Honorable Court (see especially pp. 73-78, reproduced in Appendix, p. 76, et seq.).

After this Court's decision in *Hostetter v. Idlewild Bon-Voyage Liquor Corporation,* 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964), and per curiam opinion in *Department of Alcoholic Beverage Control for the State of California v. Ammex Warehouse Company of San Ysidro, Inc.,* 378 U.S. 124, 84 S.Ct. 1657, 12 L.Ed.2d 743 (1964), affirming *Ammex Warehouse Company of San Ysidro, Inc. v. Department of Alcoholic Beverage Control for the State of California,* 224 F. Supp. 546 (D.C., S.D.Cal., 1963), became available,

Petitioners, in a reply brief submitted in the Court of Civil Appeals for the Third Supreme Judicial District of Texas (Appellants' Reply to Appellees' Brief, a copy of which certified to by the Clerk of that Court is now before this Honorable Court) contended, as they now contend as Petitioners here, that those decisions conclusively establish the right of the State of Texas to regulate the business of selling for export tax-free liquor from United States Government Customs Bonded Warehouses and, therefore, the validity of the Texas regulatory measure here in question. That statute, as noted above, was drafted after the decision of the three-judge court in the *Idlewild* case and is quite obviously based upon the facts and the law as declared by that Court.

The "export" liquor sellers, who were Appellees below and are Respondents here, emphasized the superficial similarities between their operations and those of the sellers in the New York and California cases and contended, as the Court of Civil Appeals noted (384 S.W.2d 768, at 770 and Appendix, p. 45), that this Court's rulings in the two cases were "controlling and that the 21st Amendment to the Constitution does not permit the State to regulate liquor passing through its territory under the supervision of the United States Bureau of Customs." The Court of Civil Appeals adopted the Appellees' argument and held (384 S.W. 2d 768 at 772 and Appendix, p. 50):

> "We believe that the Statute is in the face of the Commerce Clause and the Supremacy Clause, as set out in the Idlewild and California Ammex cases, supra."

Quite obviously the parties here have drawn from

this Court's rulings diametrically opposite conclusions. Petitioners believe that this Court clearly authorized State regulation. Respondents and the majority of the Austin Court of Civil Appeals apparently believe that any form of State regulation is prohibited. The concurring opinion (384 S.W.2d 768 at 772 and Appendix, p. 51, et seq.) takes the position that the Legislature of the State of Texas has no authority upon the basis of existing conditions and facts before it to find a need for regulation and that regulation should be sustained only upon sworn testimony that a "significant quantity of liquors" sold by these "export" sellers had in fact been diverted for consumption in Texas. Such divergent interpretations of this Court's rulings—particularly in a matter of the significance of the State's right to regulate an aspect of the liquor industry—and the resulting need for clarification might alone be abundant reason for the grant of certiorari here.

There are, however, a number of other facts material to consideration of the questions presented. Those facts are most plainly demonstrated by noting the differences between the facts in Texas and the New York and California situations which were before this Court in *Hostetter v. Idlewild Bon-Voyage Liquor Corporation,* 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964), and *Department of Alcoholic Beverage Control for the State of California v. Ammex Warehouse Company of San Ysidro, Inc.,* 378 U.S. 124, 84 S.Ct. 1657, 12 L.Ed.2d 743 (1964), affirming, per curiam, *Ammex Warehouse Company of San Ysidro, Inc. v. Department of Alcoholic Beverage Control for the State of California,* 224 F.Supp. 546 (1963).

The law of Texas is entirely different from the laws of New York and California. The Texas statute in question, quoted above (p. 6), authorizes the business of selling alcoholic beverages for export from United States Customs Bonded Warehouses and provides a permit for those desiring to operate such businesses. New York contended that the Idlewild business was "illegal under the provisions of the New York Alcoholic Beverage Control Law, because the business was *unlicensed*[3] and *unlicensable,* under that law" (377 U.S. 326, 84 S.Ct. 1294). New York was attempting "to *prohibit absolutely*" (377 U.S. 329, 84 S.Ct. 1296). In California *"none of the state's licensing provisions fit the proposed operation of the plaintiffs"* (224 F.Supp. 551); "no licensing provision of the present state act cover plaintiff's operations. *Defendant would therefore bar Plaintiffs from this business"* (224 F.Supp. 552).

The Texas statute is regulatory. It declares that it is based upon "an urgent need to . . . bring within the scope of *State regulatory authority"* the business in which Respondents are engaged because "Texas has an extensive international boundary along which the sale of liquor can be effectively regulated and controlled . . . only by requiring all persons engaged in any legitimate phase of the liquor industry to hold permits or licenses" (Emergency Clause of statute in question, quoted above, p. 9). New York had *"not sought to regulate* or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. . . . Rather *New York has sought totally to prevent* [the] *transactions* [of Idlewild]" (377 U.S.

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[3]All emphasis has been supplied unless the contrary is noted.

333-334, 84 S.Ct. 1299). In California the Liquor Authority did *"not seek to use the power of California to regulate* or supervise. It seeks to terminate" (224 F.Supp. 557).

The warehouses maintained by the Texas liquor sellers are completely different from those out of which the liquor in New York and California is sold. Other than Border Bonded which has only a Class 2 United States Customs Bonded Warehouse (S.F. 355, 369, 433), all of the Respondents have Class 2 and 8 United States Customs Bonded Warehouses (S.F. 21, 135, 162, 174, 304, 434, 542). The Class 2 and 8 Warehouses are ordinary storage establishments (19 U.S.C.A. 1555, 1562, quoted in Appendix, p. 57, et seq.); the only distinction between them is that in a Class 8 Warehouse the collector of Customs *may* authorize repackaging if "it is necessary to the *safety or preservation* of the merchandise" (19 U.S.C.A. 1562; 19.11 Customs Regulations of the United States, CR-386-387, quoted, Appendix, p. 58, et seq.). The Idlewild operation in New York is conducted out of a warehouse authorized under "19 U.S.C.A. § 1311" (377 U.S. 327, 84 S.Ct. 1295, ftn. 3). The California operation is conducted from the same type warehouse. "Pursuant to the Commerce Clause the Congress enacted Section 311 of the Tariff Act of 1930 (19 U.S.C.A. § 1311) providing for bonded manufacturing warehouses" (224 F.Supp. 553). The bonded manufacturing warehouses, identified as Class 6, were created and designed and are operated primarily for exportation. They are controlled by totally different statutes and regulations (19 U.S.C.A. 1311 and 19.13 Customs Regulations of the United States, CR 387-388, quoted, Appendix, p. 63, et seq.).

Only Ammex purported to introduce documentary evidence of authority to operate as a Class 2 and 8 United States Customs Bonded Warehouse. A Xerox reproduction (Pl.Ex. 3, S.F. 21, 587) was identified as the authorization for the Ammex warehouse at Hidalgo, Texas. There was testimony that similar letters had been issued for each Ammex warehouse (S.F. 21), and the other Respondents, except Border Bonded, testified that they had the same type of authority (S.F. 135, 162, 174, 304, 318, 319). The reproduction (Pl.Ex. 3, S.F. 21, 587), bears the typed signature, "O. H. Kazen, Collector of Customs," and appears to have been signed by S. W. Trout, Assistant Collector. *The letter grants no authority whatsoever to repackage any liquor or merchandise of any kind.* The controlling statutory provision (19 U.S.C.A. 1562, Appendix, p. 58) and Customs regulation (19.11, CR 386-387, Appendix, p. 61), therefore, is that *"no merchandise shall be withdrawn from bonded warehouse in less quantity than an entire* bale, cask, box, or other *package . . .* the *original package in which imported."* Respondents themselves testified that they receive their shipments of liquor in cases, "twelve bottles to a case" (S.F. 109, 117, 170-171, 276, 311, 318, 372) and that they remove the liquor from the cases in which it was received and package it in ordinary paper sacks for delivery to their customers (S.F. 109, 171, 180, 276, 311, 552, Tr. 355). There are no restrictions on packaging or repackaging of withdrawals from the Class 6 Bonded Manufacturing Warehouses (19 U.S.C.A. 1311; Appendix, p. 63; 19.13 Customs Regulations of the United States, CR 387-388, Appendix, p. 67), from which the New York and California liquor sellers operate. The operations of the Texas sellers are in violation of their

Federal authority; they have no permit to repackage, and, since removing a bottle of whiskey from a case and putting it in a paper sack could hardly be said to be for the "safety or preservation" of the whiskey, the operation could not be authorized under the statute. There was no showing of violation in New York or California, and the operations as described in the opinions, are not contrary to the authority the sellers were said to have.

There is a marked and significant difference in the areas of delivery. The liquor sold by the Texas sellers is delivered within the ordinary confines of the State of Texas, on open street corners of the Texas towns in which Respondents' businesses are conducted (S.F. 115, 162, 275, 304, 312, 319, 338, 350, 351). The liquor sold by Idlewild in New York "is transferred directly to the departing aircraft . . . and is not delivered to the customer until he arrives at his foreign destination" (377 U.S. 325, 84 S.Ct. 1294). In California the liquor "is delivered to the customer as he departs... into Mexico" from "a 60 foot strip declared by the President to be a public reservation as a protection against smuggling . . . [over which] the United States has jurisdiction" (224 F.Supp. 548-549).

There is a marked and significant difference in the amount of business being conducted. At the time of trial there were in Texas seven firms operating seventeen liquor selling establishments in the six major Texas towns along the Mexican border (see footnote 1, p. 16). In New York only one small business, Idlewild, operating at an international airport, was involved (377 U.S. 325, 84 S.Ct. 1294). In California "plaintiffs" were "two California corporations" (224 F.Supp. 548).

There is a difference in possibility and likelihood of diversion for use within the State. Because the liquor is tax-free, Respondents' prices are less than half the prices charged for the same liquor by State authorized, tax-paying package stores (S.F. 214, 280, 551). Liquor sold by Respondents is delivered to the customers on the Texas side of the international bridges on public streets of the Texas towns in which Respondents operate their businesses (S.F. 115, 138, 162, 275, 304, 312, 319, 338, 350, 351). The so-called "export offices" maintained near the bridges and in the vicinity of which the deliveries are made, are hardly larger than an ordinary telephone booth (Plaintiffs' Exhibit 9-17, S.F. 53, 54, 62, 64, 66, 67, 69, 593-601). *Only one export officer is on duty* (S.F. 117). The liquor is packaged in ordinary paper sacks (S.F. 108, 171, 180, 276, 311, 355, 552). The paper sacks of liquor, sometimes as many as a hundred or more, are lined up along unfenced sidewalks (S.F. 200, 201, 234). Deliveries are frequently being made by three of the Respondents at one time in the same general area (S.F. 208, 518, 519, 549). Deliveries are made on both sides of the street (S.F. 178, 519) to pedestrians as well as persons in automobiles (S.F. 45, 67-68, 104, 184, 248, 519, 548-549). Traffic of all types is heavy (S.F. 207, 518, 520, 549). In Brownsville there is an ordinary supermarket between the so-called export office and the international bridge (S.F. 177, Plaintiffs' Exhibit 16). There is also an alley-way behind the Humble station at the side of which one of the Respondents makes its deliveries (S.F. 177, 518). There is no physical barrier which would prevent persons from accepting delivery of the liquor and then going down the alley and remaining in Texas (S.F. 520). Persons can also accept delivery,

walk part way to Mexico, turn around, and walk back into Texas (S.F. 287). There is nothing except a person's own conscience to determine whether he will go into Mexico or remain in Texas (S.F. 311).

The method of operation of the Texas sellers does not fulfill the definition of exportation or evidence of exportation as provided in Title 26, Code of Federal Regulations, Exportation of Liquors, Subpart B, § 252.11 and § 252.40 (Appendix, p. 74, et seq.). The liquor sold by Idlewild in New York is exported; it "is transferred directly to the departing aircraft . . . and is not delivered to the customer until he arrives at his foreign destination" (377 U.S. 325, 84 S.Ct. 1294). In contrast with the oversize telephone booth type "export offices" maintained on the public streets of some Texas towns, with most of the thousand mile Texas-Mexican border unbarricaded and unguarded, "at the boundary between California and Mexico there is a 60 foot wide strip declared by the President to be a public reservation as a protection against smuggling. . . . The state of California and the United States have concurrent jurisdiction over the 60 foot strip" (224 F.Supp. 548-549). The "office of the U.S. Bureau of Customs [is] located within such strip" (224 F.Supp. 548). The liquor sold in California is "delivered to the customer as he departs from the 60 foot strip into Mexico" (224 F. Supp. 549). The liquor would be confiscated if not exported. "If he does not cross the border, the custody [of the liquor] may be taken from the customer" (224 F.Supp. 549).

A bottle of Chivas Regal Scotch whiskey sold in Texas by one of the Respondents is in evidence before this Court, together with the paper sack in which it

was "packaged" for sale (Int. Exhibits 3 and 4, S.F. 552-553). Other liquor apparently sold by Respondent liquor sellers in Texas has been brought back into Texas (S.F. 516, 517, 523, 526, 532-533, 534). In New York "the Liquor Authority . . . neither alleged nor proved the diversion of so much as one bottle of plaintiff's merchandise to users within the state of New York" (212 F.Supp. at 386, quoted 377 U.S. 328, 84 S. Ct. 1296). In California at the time of trial the liquor sellers' operations were only "proposed" (224 F.Supp. 548).

The Court of Civil Appeals for the Third Supreme Judicial District of Texas in the opinion here brought before this Court ruled that the State of Texas is by the Constitution of the United States, prohibited from regulating the businesses of the Respondent liquor sellers and affirmed the trial court judgment permanently enjoining the Texas Liquor Control Board, its Administrator, officers, agents, and successors in office from in anywise, directly or indirectly, interfering with, controlling or regulating any of the Respondent liquor sellers.

The Court of Civil Appeals for the Third Supreme Judicial District of Texas was the highest court of the state in which a decision could be had. In view of the procedures specified above (p. 2), the decision meets the jurisdictional requirements of this Court. *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, at 160, 74 S.Ct. 396 at 397, 98 L.Ed. 583 (1954).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Unless this Court grants petition for certiorari, the

State of Texas will be forever prohibited from exercising any control over a portion of the liquor industry operated exclusively within the State. The present significance of the problem is shown—and future prospects are indicated—by the fact that between June of 1961 and August of 1963 the extent of this type operation in Texas increased from a single firm at one location (S.F. 10) to seven firms with seventeen different establishments (Tr. 334-336). During that period the State could not and did not attempt to interfere because of the injunction incorporated in a trial court decision in the first Texas Ammex case (Tr. 12-16). The growth of the businesses and their activities, however, caused the Texas Legislature to find a need for regulation and to enact the statute here in question for that purpose.

The measure, therefore, was passed in an effort to bring the businesses already established in Texas under State control and, as noted above, was based directly upon *Idlewild Bon-Voyage Liquor Corporation v. Epstein,* 212 F.Supp. 376 (D.C., S.D.N.Y., 1962), where the three-judge Federal Court held that New York could not "absolutely prohibit" the Idlewild business but carefully explained that "New York no doubt has the power to regulate plaintiffs' operation for local protection" (212 F.Supp. 383). Previously the Court had pointed out that (212 F.Supp. 382):

> ". . . Plaintiff's operation is a small one. We are not made aware that there is any other like it in New York or elsewhere. If others exist apparently no effort has been made to eliminate them. Moreover the very nature of the business allows for only a few such enterprises and an operation very limited in size and scope. . . ."

Since even under those circumstances New York "no doubt" had "the power to regulate . . . for local protection," the decision provided abundant authority for the State of Texas, with an unbarricaded, unguarded international boundary approximately a thousand miles in extent and with the number of "export" liquor sellers rapidly increasing, to enact the statute in question upon the basis of findings, as declared in the emergency clause, that:

> ". . . there is an urgent need to amend the Texas Liquor Control Act to bring within the scope of State regulatory authority the judicially declared legitimate business of exporting United States bonded liquor in less than wholesale quantities . . . and that Texas has an extensive international boundary along which the sale of liquor can be effectively regulated and controlled for the benefit of the people of the State of Texas only by requiring all persons engaged in any legitimate phase of the liquor industry to hold permits or licenses issued by this State through the Liquor Control Board."

The body of the statute (quoted above, p. 6) provides a permit and authorizes procedures in conformity with the Idlewild operation. Its regulatory measures are obviously designed to prevent unlawful diversion within the State of Texas. Nevertheless, and in spite of the fact that this Court affirmed the decision of the New York three-judge court, the Court of Civil Appeals for the Third Supreme Judicial District of Texas has held that the Texas statute is unconstitutional under the Commerce and Supremacy Clauses of the Constitution of the United States.

In making that holding the State court has decided

substantial Federal questions in a manner which does not appear to be in accord with applicable decisions of this Honorable Court, notably *Hostetter v. Idlewild Bon-Voyage Liquor Corporation,* 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964); and *Department of Alcoholic Beverage Control for the State of California v. Ammex Warehouse Company of San Ysidro, Inc.,* 387 U.S. 124, 84 S.Ct. 1657, 12 L.Ed2d 743 (1964), a per curiam opinion affirming *Ammex Warehouse Company of San Ysidro, Inc. v. Department of Alcoholic Beverage Control for the State of California,* 224 F.Supp. 546 (D.C., S.D.Cal., 1963). The right of a state to require permits of persons engaged in an aspect of the liquor industry has been repeatedly recognized, *Department of Revenue v. James B. Beam Distilling Company,* 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964). In *Ziffrin v. Reeves,* 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939), as well as in other decisions, this Court has upheld the state's right to regulate the transportation of intoxicants in a manner comparable with that provided in the Texas statute.

Although this Court in affirming *Idlewild* did not repeat the three-judge court's specific holding that New York could regulate for local protection, such a holding is clearly implied. This Court's final ruling was (377 U.S. 333-334, 84 S.Ct. 1299):

> "... The State has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. As the District Court emphasized, this case does not involve 'measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York.' 212 F.Supp., at 386. Rather, the State

> has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do."

Moreover, after citing *Collins v. Yosemite Park Company,* 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938), as reflecting the principle applicable to the situation under consideration, this Court explained that (377 U.S. 333, 84 S.Ct. 1298):

> "We may assume that if in Collins California had sought to regulate or control the transportation of the liquor there involved from the time of its entry into the State until its delivery at the national park, in the interest of preventing unlawful diversion into her territory, California would have been constitutionally permitted to do so. . . ."

A footnote to that statement cites two of the Federal statutes upon which Petitioners here rely. The Twenty-First Amendment, also urged by Petitioners, had been previously discussed at length (377 U.S. 329-332, 84 S.Ct. 1296-1298), and the ultimate ruling was identified as an "accommodation of the Twenty-First Amendment with the Commerce Clause" (377 U.S. 333, 84 S. Ct. 1299).

The holdings are substantially identical in *Ammex Warehouse Company of San Ysidro, Inc. v. Department of Alcoholic Beverage Control for the State of California,* 224 F.Supp. 546 (D.C., S.D.Cal., 1963), which this Court in *Department of Alcoholic Beverage Control for the State of California v. Ammex Warehouse Company of San Ysidro, Inc.,* 378 U.S. 124, 84 S. Ct. 1657, 12 L.Ed.2d 743 (1964), affirmed with a per

curiam opinion citing the *Idlewild case*. Like the New York court, the California Federal court specifically construed Commerce Clause "cases as holding that a State may reasonably *regulate* interstate or foreign shipments of liquor for good cause" (224 F.Supp. 557, emphasis by the Court). The Court had previously noted that "none of the state's licensing provisions fit the proposed operations of the plaintiffs" (224 F.Supp. 551) and emphasized that situation in the final ruling that (224 F.Supp. 557):

> ". . . the *injunction is limited to activities of the State in enforcing* the Alcoholic Beverage Control statutes *as they now exist*. If the State of California sees fit to pass statutes and regulations directed *towards reasonable regulation* of plaintiffs' business, *this will be another case for another day.*"

By the enactment of the statute here in question, the State of Texas has attempted to *regulate* the business of selling liquor for export from United States Customs Bonded Warehouses. There was no comparable statute either in New York or California. In the phraseology of the California Federal court, this should have been viewed as "another case for another day."

The Texas court, however, neither approached the case in that manner nor applied the general principles laid down and approved in this Court. The State court failed to construe Commerce Clause cases as holding that a state may *regulate;* it sought no "accommodation of the Twenty-First Amendment with the Commerce Clause" as this Court had made; it disregarded this Court's view of the Twenty-First Amendment expressed in cases which have "remained unquestioned" (377 U.S. 330, 84 S.Ct. 1297); it ignored the fact that "quite independently of the Twenty-First Amend-

ment, the Court has sustained a State's power within the confines of the Commerce Clause to regulate and supervise the transportation of intoxicants through its territory" (Ftn. 10, 377 U.S. 331, 84 S.Ct. 1297). Nevertheless it was upon the basis of this Court's decisions discussed above that the State court held the Texas regulatory statute unconstitutional "in the face of the Commerce Clause and the Supremacy Clause, as set out in the Idlewild and California Ammex cases" (384 S.W.2d 772 and Appendix, p. 50).

It is, therefore, respectfully submitted that the State court has decided Federal questions of substance in a way not in accord with applicable decisions of this Court and that grant of certiorari is clearly indicated here by such decisions as *J. F. Fitzgerald Construction Co. v. Pedersen,* 324 U.S. 720, 65 S.Ct. 892, 89 L.Ed. 1316 (1945), and *Missouri Pacific Railroad Company v. Elmore & Stahl,* 377 U.S. 134, 84 S.Ct. 1142, 12 L.Ed. 2d 752 (1964).

In *State of Alaska v. Artic Maid, et al.,* 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227 (1961), this Court granted certiorari because of the importance of the case to the State of Alaska. The present case is equally, if not more, important to the State of Texas. Unless the petition is granted, the entire system of regulation of the sale of alcoholic beverages within the State is jeopardized. This is not a small operation such as this Court was considering in *Idlewild* nor a situation where existing and established Federal supervision could be assumed to prevent unlawful diversion within the State as the different type warehouses and the 60-foot strip provided in the California case.

The Respondent liquor sellers have spread their op-

erations along the entire Texas-Mexican border from Brownsville to El Paso. Their effect on the regulated liquor industry is demonstrated by the fact that Chivas Regal Scotch, the most popular brand handled by Respondents (S.F. 280), sells in State-authorized tax-paying package stores at from $8.50 (S.F. 551) to $9.85 a fifth (S.F. 281), while Respondents sell the same identical liquor (S.F. 553; Int.Ex. 4) at from $4.00 (S.F. 214) to as low as $3.33 a fifth (S.F. 280). When it is recalled (see pp. 26-27, supra) that Respondents package in paper sacks, deliver on open streets during rush hours, in heavy traffic, at places where there is ample opportunity for either persons in cars or pedestrains to accept delivery of liquor but remain in Texas, it appears unquestionable that the situation constitutes an open invitation to smuggling, tax evation, or tax avoidance. A paper sack with two fifths of Scotch in it does not, on the outside, present any marked difference in appearance from another paper sack containing a quart of milk or a carton of eggs. Unfortunately there are many persons who are not blessed with a standard of honesty so high that they will pay $8.50 or $9.00 to purchase legally what they can acquire for $3.00 or $4.00 by the simple expedient of placing an order with one of the Respondents and selecting a delivery time during rush hour when they can pick up their liquor, go to a supermarket, turn down an alley, drive into a filling station, or simply fall in with the flow of the traffic moving in the opposite direction.

Unless this Court grants the present petition for certiorari, there is no doubt that the Texas situation will continue, and, in all reasonable probability, it will worsen. The significance of the case, however, is not

limited to Texas. If this Court denies certiorari here, that ruling—whether justifiably or not—would be urged and probably accepted as preventing either New York or California from regulating the export sellers in those states. State regulation may not be so necessary there, but the implication of a right in such business to operate free of state control which would result from a denial of certiorari would encourage the establishment of the same type of businesses along the entire Canadian border where duplicates of the Texas situation could easily and likely would result. Not only would the regulated liquor industry in every border state suffer, but the states themselves would be forced either to accept a situation where tax-free, uninspected, unregulated liquor is readily available for being retained in or brought illegally back into the state or to provide constant and close supervision of the entire state boundary.

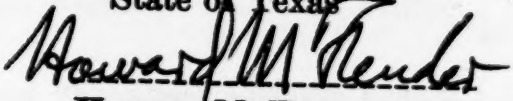
These are operations from which the government derives no benefit—by tax or otherwise. They seek to use Federal authority to secure freedom from State control in a type of transaction which Federal law neither was designed nor is adapted to regulate. Local sales of liquor, one, two or three fifths at a time, is—or ought to be—a State matter, even in a border town. That is particularly true in Texas, where Respondents admit that they make no sales in Mexico (S.F. 172), that neither they nor their agents or employees have ever transported any liquor across an international boundary (S.F. 168, 283, 337), that they have never shipped any liquor consigned to anyone in a foreign country (S.F. 168, 314, 337), and that they have no control over the liquor which they sell after its deliv-

ery to the purchaser within the State of Texas (S.F. 286).

It seems highly unlikely that this Court in making its rulings in the *Idlewild* case intended to sanction and approve the operations and the conditions which exist in Texas today. The State court, however, has so interpreted this Court's decisions.

WHEREFORE, Petitioners pray that this Court grant petition for certiorari and, upon final hearing of this case, reverse the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, clarify the meaning of previous decisions, and uphold the State's authority to regulate.

Respectfully submitted,
WAGGONER CARR
Attorney General of the
State of Texas



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CERTIFICATE OF SERVICE

HOWARD M. FENDER, a member of the bar of the Supreme Court of the United States, hereby certifies that he is attorney of record for the Petitioners in the above entitled action, and that he has served a copy of the above and foregoing motion upon Respondents by mailing same to Mr. R. Dean Moorhead, First Federal Building, Austin, Texas, Attorney for Respondents, said copy being mailed by regular United States mail with the postage duly paid thereon, on this the 18 day of October, 1965.

Howard M. Fender

HOWARD M. FENDER

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STATE APPELLATE COURT DECISION IN QUESTION

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

No. 11,248

TEXAS LIQUOR CONTROL BOARD ET AL.,
Appellants

VS.

AMMEX WAREHOUSE COMPANY, INCORPORATED ET AL.,
Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT, NO. 132,400, HONORABLE HERMAN JONES, JUDGE.

This case involves the constitutionality of a State law, a statute amending the Texas Liquor Control Act to provide a permit for and to regulate the retail sale of alcoholic beverages for export. Appeal is from a judgment of the trial court in an action which consolidated five separate but substantially identical suits filed on behalf of seven firms operating seventeen liquor selling establishments in the six major Texas towns on the Mexican border.

Each petition sought declaratory judgment holding the amendatory statute unconstitutional and perma-

nent injunction prohibiting the Texas Liquor Control Board, its Administrator, agents, and employees from enforcing or attempting to enforce the new law. Separate temporary injunctions were issued but the five cases were formally consolidated for trial on the merits. The judgment of the trial court granted to the plaintiffs all the relief sought, declaring the statute unconstitutional and enjoining the Texas Liquor Control Board, its Administrator, agents, and employees from enforcing the statute or in any way interfering with the conduct of plaintiffs' businesses. The State of Texas, on behalf of the defendants, immediately filed notice of appeal. At the plaintiffs' request the trial court filed extensive findings of fact and conclusions of law.

The appeal is based on ten points assigned as error, and, in effect are that the court erred in holding that, as a matter of law, Federal, Constitutional and Statutory provisions prohibit State regulation of appellees' businesses, that there is no evidence, or the evidence is insufficient to support the trial court's holding that appellees are exporting liquor, and no evidence or the evidence is insufficient to support the trial court's holding that appellees are conducting their businesses in compliance with Federal regulations; that the court erred in failing to uphold the constitutionality of the Statute in question; that there is no evidence, or the evidence is insufficient to support the trial court's holding that it would be impossible for appellees to conduct their businesses in compliance with the Statute in issue, and that there is no evidence or the evidence is insufficient to support the trial court's holding that the amendatory Statute in question would create conflict with Federal Law.

The Statute brought into question by this suit (Acts 1963, 58th Leg., Ch. 108, p. 196) as codified (Article 666-15 (7b) V.A.P.C.) reads:

"(7b) United States Bonded Liquor Export Permit. A United States Bonded Liquor Export Permit shall authorize the holder thereof to:

(a) Purchase liquor in bond from holders of Texas Wholesalers' Permits or purchase liquor from distillers, brewers, wineries, wine bottlers, rectifiers, and manufacturers who are holders of Nonresident Seller's Permits and import into the State of Texas at a United States bonded dock such liquor in transit for exportation purposes.

(b) Transport such liquor from the United States bonded dock at point of entry under United States Bond to a United States bonded warehouse within the State of Texas.

(c) Warehouse such liquor under United States bond.

(d) For the purpose of exportation only, solicit orders for, take orders for, and accept payment for any quantity of said liquor in unbroken original containers.

(e) Cause such liquor to be withdrawn from a United States bonded warehouse for exportation, in compliance with United States Custom regulations, and delivered to a public common carrier for transportation, in compliance with such carrier's established rate schedule, into the country of export by such common carrier or by such common carrier's affiliated common carrier in the country of export, for delivery to the purchaser at a designated address outside the continental limits of the United States or for delivery to a named qualified person at a designated address outside the continental limits of the United States.

The annual state fee for a United States Bonded Liquor Export Permit shall be Seven Hundred and Fifty Dollars ($750).

The privileges authorized by this Section are cumulative and not in lieu of requirements of Federal Law in the conduct of such operations. It is specifically provided, however, that permits under this Section shall not be required for the wholesale export of United States bonded liquor by the holder of any other type of permit which, under existing Statutes and the rules and regulations of the Texas Liquor Control Board, authorizes the wholesale exportation of liquor in compliance with Federal Law."

The idea of selling tax and duty free liquor "for export . . . without State and Federal taxes was developed by Hal G. Ward who founded Ammex Warehouse Company, and secured from the Texas Liquor Control Board a wholesaler's permit provided for in the Act, and filed bonds to operate a Class 2 and 8 bonded warehouse, and began operations at Laredo, Texas in June, 1961.

Shortly thereafter the Liquor Board cancelled Ammex's wholesale permit; such permits authorize the exportation of liquor but only in wholesale quantities. The appellees generally sell in quantities of one to three bottles.

Certain phases of this litigation were before this Court in Texas Liquor Control Board v. Jones, 378 S.W.2d 898, and before our Supreme Court in Ammex Warehouse Company v. Archer, 381 S.W.2d 478, and the history of the subject matter was recited and discussed and we make reference to the cases, and will endeavor to confine our consideration to the issues in

the instant case and not restate issues disposed of in the decision by the Supreme Court.

There is now pending Civil Action No. 1466 in the United States District Court for the Western District of Texas, Austin Division, Ammex Warehouse Company, Inc. et al. v. Texas Liquor Control Board et al.

Appellees take the position in this present suit on appeal that the cases of Hostetter v. Idlewild Bon-Voyage Liquor Corporation, — U.S. —, 84 S.Ct. 1293 (1964) and Department of Alcoholic Beverage Control for State of California v. Ammex Warehouse Co. of San Ysidro, Inc., — U.S. —, 84 S.Ct. 1657 (1964) are controlling and that the 21st Amendment to the Constitution does not permit the State to regulate liquor passing through its territory, under the supervision of the United States Bureau of Customs acting under Federal Law for sale and delivery at foreign destinations.

Appellees contend further that the Commerce Clause, the Export-Import Clause and the Supremacy Clause of the Constitution of the United States preclude application of House Bill to them and their businesses and make such Bill unconstitutional as applied to their businesses, and that the bill is unconstitutional and unenforceable because it is "so vague, uncertain, ambiguous and unclear that it does not inform with reasonable certainty those persons who would be subject to its provisions as to what it means."

The Board takes the position that the evidence fails to show exportation in fact.

The appellees maintain warehouses and sales areas in various border towns in Texas, where they take

orders and receive payment for liquor and make deliveries in the towns where such businesses are located. No sales are made in Mexico and no liquors are transported across the international boundary and appellees had no control over the liquor after its delivery to purchasers, who transport the liquor. Such activities, appellants contend, do not fulfill the legal meaning of "export" as given in Swan & Finch Company v. United States, 190 U.S. 143, 23 S.Ct. 702, 47 L.Ed. 984, and as the leading case Empresa Siderurgica, S.A. v. County of Merced, 337 U.S. 154, 69 S.Ct. 995, 93 L.Ed. 1276.

Appellants say that the holding of liquor in "bond" does not establish exportation by appellees, and the actions and conduct by the appellees do no more than show an intent to export and that the receipt of liquor for export and the ultimate exportation does not establish the business of exporting liquor and cite Joy Oil Company v. State Tax Commission of Michigan, 337 U.S. 286, 69 S.Ct. 1075, 93 L.Ed. 1366.

Appellants assert that taxation is not involved in this case and that the fundamental question is the State's right to regulate the businesses of appellees and not to tax the liquor while in bond, and that there is no factual or legal basis on which appellees can be designated as exporters.

By points IV and V appellants claim that appellees' testimony shows violation of Customs Statutes, and there is no evidence, or that the evidence is insufficient to support the Court's holding that appellees are conducting their businesses in compliance with Federal regulations.

There is no dispute as to the facts in the case. Appellees receive their liquor by the case, and except for

Border Bonded, the sales are in quantities of one to three bottles per customer. The liquor is removed from the cases in which it was received and packagd in paper sacks for delivery. Border Bonded sells only in case lots.

Appellants' VI point in that the trial court erred in failing to uphold the constitutionality of the Amendatory Statute in question and by points VII, VIII, IX and X that there is no evidence, or that the evidence is insufficient to support the trial court's holding, that it would be impossible for appellees to conduct their businesses in compliance with the Statute in question and would create a conflict with Federal Law.

Appellants' view of this litigation is that the law is entitled to the presumption of validity and that the burden of proof was on appellants as plaintiffs in the trial court, and cite among other cases Duncan v. Gabler, 147 Tex. 229, 215 S.W.2d 155, and that the Federal government has given to States broader regulatory powers over alcoholic beverages than to other items of commerce and cite Clark Distilling Company v. Western Maryland Railway Company, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326, and United States v. Frankfort Distilleries, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951.

As we have stated, most of appellees' liquor is packaged in paper sacks and carted to the walkway at this end of the bridge and lined up on the sidewalk awaiting delivery.

Deliveries are made both to vehicles and to pedestrians and in most instances by cartmen on both sides of the street by Ammex and Kings Mart on one side and other appellees on the other side.

The traffic, especially in evening time, is very heavy across the bridge and there is a possibility that some bottles might be smuggled back into Texas, but we have not had our attention directed to any such violations by customers who have purchased liquor for export. It is also possible that some purchasers would take liquor into Mexico and return with it to Texas and avoid Federal tax and pay only the State Tax. This would be accompanied by a legal risk.

The nature of the traffic and not its incidents, determines its character.

T. & N.O. Ry. Co. v. Sabine Tram Co., 227 U.S. 111, 33 S.Ct. 229.

Appellees maintain stocks of whisky and cigarettes on which no Federal taxes or duties and no Texas taxes have been paid, because such merchandise has been brought to the warehouses and stored there in bond, pursuant to applicable regulations of the U.S. Customs Bureau.

The liquor is in the sole custody of the customs officers stationed at the warehouses, who, under an arrangement approved by the Bureau, appellees reimburse the United States for the salaries paid to such officers, who only handle the stored liquor.

The warehouses are located in buildings that are divided into a bonded warehouse area and a store area connected by locked doors, with one key held by customs officers and the other by employees of appellees, the latter work only in the store area. No whisky is kept in the store area. Customers are not permitted in the warehouse area.

Ordinarily sales are in lots of three bottles or less.

(The Mexican Government allows one entering Mexico to bring three bottles of liquor per person, per day.)

A purchaser of liquor orders liquor on forms approved by the Bureau and pays appellees for such and is given a receipt. Other forms are given to the customs officers, who withdraw the whisky called for in the forms and make entries in the warehouse records.

The liquor is delivered to a bonded cartman, who carries the liquor in bond to the customs station at the end of the international bridge.

The purchaser presents his receipt and is handed the whisky he has purchased and delivery is made under the supervision of the customs officer. The whisky is carried into Mexico and a form certifying that the whisky has been exported is signed by the customs officer, which is placed with the other records that are kept by the Bureau.

The above outlined procedure is similar to that set out in the cases in which Ammex is named, hereinabove cited. In the Hostetter case the manner of delivery is somewhat different, in that the liquor is placed on the aircraft and not given to the purchaser until he lands on foreign soil.

We believe that the procedure in use by appellees is in substantial compliance with that set out in the cases referred to.

The trial court made extensive findings of fact and conclusions of law which we have read and considered and believe are supported by the record as a whole and justified by law.

4 Tex.Jur.2d 333.

As may be seen, the law in question seeks to confine appellees' purchases from wholesalers holding permits from Texas and to make deliveries by common carrier. We believe that House Bill 782 if complied with in its entirety, would be an economic impossibility, and would go further than to regulate, but would prohibit appellees from carrying on their businesses.

The appellees are not immune from Texas law or from the Texas Liquor Control Act, and if they should disregard their bonded procedure, contrary to Federal Law and regulation, and divert some of their liquor into Texas, they would be subject to prosecution, apart from House Bill 782.

We believe that the Statute is in the face of the Commerce Clause and the Supremacy Clause, as set out in the Idlewild and California Ammex cases, supra.

The judgment of the trial court is affirmed.

Roy C. Archer, Chief Justice

Affirmed

Filed: December 2, 1964.

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

No. 11,248

TEXAS LIQUOR CONTROL BOARD ET AL.,
Appellants

VS.

AMMEX WAREHOUSE COMPANY, INCORPORATED ET AL.,
Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT, NO. 132,400, HONORABLE HERMAN JONES, JUDGE.

CONCURRING OPINION

In an Amicus Curiae brief the statement is made that, "The State of Texas is seeking to supervise and regulate the transportation of liquor through its territory for the purpose of guarding against a diversion of liquor into domestic channels, and the Liquor Control Board has both alleged and proved the diversion of appellees' merchandise to users within the State of Texas. Delivery is made in Texas."

If there was in this record any evidence which shows that any liquors, at least any significant quantity of liquors, sold by appellees for export was consumed in Texas or diverted for use in Texas, or that there was any reasonable likelihood that such might occur, then

I would sustain all of the regulations adopted by the State which were reasonably calculated to prevent such diversion. Clearly Texas has authority to so protect itself. Ziffrin v. Reeves, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128.

The same brief states that the entire State Regulated Liquor Industry along the Rio Grande Valley is vitally interested in sustaining the statutes here attacked.

If the Liquor Control Board, its agents, and all of the interested liquor dealers along the border have not during this controversy been able to show that one bottle of liquor certified by the United States export official as having been exported to Mexico was not in fact exported or that it has in some manner been consumed or re-sold in Texas, then it seems to me that the patently foolproof method used by appellee to export this liquor is in fact foolproof.

I do not believe that the fact of "delivery in Texas" under the described circumstances is any more proof of diversion, or danger of diversion, than in the Ammex-California case where delivery was made in a strip under the joint jurisdiction of the State and Federal Governments.

Under the facts of this case, as presently appearing, I am of the opinion that the requirements of the Act before us are unreasonable as applied to appellees. I concur in the judgment.

Robert G. Hughes, Associate Justice

Filed: December 2, 1964.

Consolidated Cause No. 132,400

AMMEX WAREHOUSE COMPANY, INC., ET AL.	)	IN THE 53RD DISTRICT
	)	
	)	COURT OF
VS.	)	
	)	TRAVIS COUNTY, TEXAS
TEXAS LIQUOR CONTROL BOARD, ET AL.	)	
	)	

FINAL JUDGMENT

On the 7th day of November, 1963, came on to be heard the above styled and numbered cause, which is a consolidated cause (Causes No. 133,138, 133,535, 133,-675 and 133,602 having been, prior to trial, consolidated with Cause No. 132,400):

And came the following Plaintiffs in person and by and through their officers and attorneys:

1. Ammex Warehouse Company, Inc. (No. 132,400).

2. Vicente Garza, Jr. and Jorge Garza dba Vir Warehouse Company. (No. 133,138).

3. Albert Anzaldua dba Andy's Custom Bonded Warehouse, Francisco C. Gonzalez and Cesar Salinas, partners dba G & S Bonded Warehouse, and Sam Leland Glass, Sam Glass Pate and Olin Earl Brashear, Jr., partners dba King Mart Export Company. (No. 133,602).

4. Alfonso Casso, Raul Casso, Raul Casso, Jr. and Mrs. Alfredo San Martin, partners dba Border Bonded Warehouse. (No. 133,535).

5. Halem Ayoub and Sam Wardy, partners dba Ayoub & Wardy. (No. 133,675).

And came the Defendant Coke Stevenson, Jr. in person and by the Attorney General and the Defendants Texas Liquor Control Board by the Attorney General, and Harry J. Feldman and Charles B. Feldman, as Intervenors, by their attorneys, and all Plaintiffs, Defendants and Intervenors thereupon announced ready for trial;

And, no jury having been demanded, said consolidated cause proceeded to trial before the Court; and the Court, after hearing all of the evidence, considering the pleadings, hearing the arguments of counsel, and studying the briefs submitted to him by all parties, finds and concludes as follows:

1. The Texas Liquor Control Act, as amended by House Bill 782, Acts of the 58th Leg. (1963), Ch. 108, p. 196, codified as Article 666-15(7b), Vernon's Annotated Penal Code, cannot constitutionally be applied to Plaintiffs so long as they are engaged in the "in bond" liquor business which is hereinafter described.

2. The law and the facts are with Plaintiffs.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. Plaintiffs are hereby granted a permanent injunction against the Texas Liquor Control Board and Coke R. Stevenson, Jr., Administrator of said Board, jointly and severally, and their agents, employees, representatives and successors in office; and said persons

are hereby permanently enjoined from in anywise, directly or indirectly, interfering with, controlling or regulating any or all of the plaintiffs (namely Ammex Warehouse Company, Inc.; Vicente Garza, Jr. and Jorge Garza, partners dba Vir Warehouse Company; Albert Anzaldua dba Andy's Custom Bonded Warehouse; Francisco C. Gonzalez and Cesar Salinas, partners dba G & S Bonded Warehouse; Sam Leland Glass, Sam Glass Pate and Olin Earl Brashear, Jr., partners dba King Mart Export Company; Alfonso Casso, Raul Casso, Raul Casso, Jr. and Mrs. Alfredo San Martin, partners Border Bonded Warehouse; and Halem Ayoub and Sam Wardy, partners dba Ayoub & Wardy) in the operation of their respective businesses anywhere in the State of Texas, as such business is defined herein. The injunction here granted extends to and enjoins said persons from enforcing or in anywise attempting to enforce the Texas Liquor Control Act, as amended by House Bill 782, Acts of the 58th Leg. (1963), Ch. 108, p. 196, codified as Article 666-15 (7b), Vernon's Annotated Penal Code, against persons, firms or corporations when they are supplying liquor in bond to plaintiffs or transporting it in bond to Plaintiffs' warehouses or storing it in bond (the bonds referred to being bonds to the United States or its agencies pursuant to procedures set forth in the laws of the United States), and from in anywise indirectly doing that which they, and each of them, are directly enjoined from doing herewith. The business of the Plaintiffs, as referred to herein, is that of importing liquor into the State of Texas for exportation only, on which liquor no federal or State taxes, or United States customs duties have been paid because such liquor has been bought imported, stored, trans-

ported, handled, sold and exported while under bond to the United States or its agencies. In the event Plaintiffs should ever withdraw from bond any liquor while within the State of Texas under circumstances whereby they would make a delivery or use of the liquor so imported by them within the State of Texas, then Plaintiffs will be engaging in a business which will not be protected by this judgment or by the injunction granted herein.

2. All costs of suit are adjudged against Defendants and Intervenors, jointly and severally, for which execution may issue.

SIGNED AND FILED this the ____ day of March, 1964, at ____ o'clock __ m.

HERMAN JONES
Judge

R. Dean Moorhead
An Attorney for Plaintiffs
Waggoner Carr
Attorney General of Texas

By_____
Brady Coleman
Assistant Attorney General
Attorneys for Defendants
Clark, Thomas, Harris,
Denius & Winters

By_____
Mary Joe Carroll
Attorneys for Intervenors

FEDERAL STATUTES AND REGULATIONS UNDER WHICH RESPONDENTS ASSERT THEIR WAREHOUSE OPERATIONS ARE CONDUCTED

19 U.S.C.A. 1555

Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the own-

er or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse.

19 U.S.C.A. 1562

Unless by special authority of the Secretary of the Treasury, no merchandise shall be withdrawn from bonded warehouse in less quantity than an entire bale, cask, box, or other package; or, if in bulk, in the entire quantity imported or in a quantity not less than one ton weight. All merchandise so withdrawn shall be withdrawn in the original packages in which imported unless, upon the application of the importer, it appears to the collector that it is necessary to the safety or preservation of the merchandise to repack or transfer the same: *Provided,* That upon permission therefore being granted by the Secretary of the Treasury, and under customs supervision, at the expense of the proprietor, merchandise may be cleaned, sorted, repacked, or otherwise changed in condition, but not manufactured, in bonded warehouses established for that purpose and be withdrawn therefrom for exportation to a foreign country or for shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, without payment of the duties, or for consumption, upon payment of the duties accruing thereon, in its condition and quantity, and at its weight,

at the time of withdrawal from warehouse, with such additions to or deductions from the final appraised value as may be necessary by reason of change in condition. The basis for the assessment of duties on such merchandise so withdrawn for consumption shall be the adjusted final appraised value, and if the rate of duty is based upon or regulated in any manner by the value of the merchandise, such rate shall be based upon or regulated by such adjusted final appraised value. The scouring or carbonizing of wool shall not be considered a process of manufacture within the provisions of this section. Under such regulations as the Secretary of the Treasury shall prescribe, imported merchandise which has been entered and which has remained in continuous customs custody may be manipulated in accordance with the provisions of this section under customs supervision and at the risk and expense of the consignee, but elsewhere than in a bonded warehouse, in cases where neither the protection of the revenue nor the proper conduct of customs business requires that such manipulation be done in a bonded warehouse.

DEFINITIONS OF CLASS 2 AND CLASS 8 WAREHOUSES FROM TITLE 19, CODE OF FEDERAL REGULATIONS CUSTOMS REGULATIONS 19.1, CR 380-381

Class 2.—Importers' private bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof. A warehouse of class 4 or 5 may be bonded exclusively for the storage of goods imported by the proprietor thereof, in which case it shall be known as a private bonded warehouse.

* * *

Class 8.—Bonded warehouses established for the purpose of cleaning, sorting, repacking, or otherwise changing in condition, but not manufacturing, imported merchandise, under customs supervision and at the expense of the proprietor.

MANIPULATION IN BONDED WAREHOUSES TITLE 19, CODE OF FEDERAL REGULATIONS, CUSTOMS REGULATIONS, 19.11 CR 386-387

19.11 Manipulation in bonded warehouses and elsewhere.—(a) So far as applicable, the general provisions of the regulations governing warehouses bonded for the storage of imported merchandise shall apply to bonded manipulation warehouses and to other designated places of manipulation.

(b) Merchandise to be manipulated under section 562, Tariff Act of 1930, as amended, may be entered on customs Form 7502 and sent directly to a storage-manipulation warehouse.

(c) Merchandise entered for warehouse may be transferred to a storage-manipulation warehouse; or merchandise entered for storage-manipulation warehouses may be transferred after manipulation to the storage portion of the same warehouse, to another storage warehouse, or to a manufacturing warehouse of Class 6.

(d) The application to manipulate, which shall be filed on customs Form 3499 with the collector having jurisdiction of the warehouse or other designated place of manipulation, shall describe the contemplated manipulation in sufficient detail to enable the collector to determine whether the imported merchandise is to be cleaned, sorted, repacked, or otherwise changed in condition, but not manufactured, within the meaning of section 562, Tariff Act of 1930, as amended. *If the collector is satisfied that the merchandise is to be so manipulated, he may issue a permit on customs Form 3499,* making any necessary modification in such form. Manipulation resulting in a change in condition of the

merchandise which will make it subject to a lower rate of duty or free of duty upon withdrawal for consumption, is not precluded by the provisions of such section 562.

(e) No merchandise shall be manipulated elsewhere than in a bonded warehouse unless the merchandise has been regularly entered for consumption or warehouse and is of a class entitled to the warehousing privilege under Section 557, Tariff Act of 1930, as amended.

(f) Upon compliance with the provisions of Paragraph (d) of this section, manipulated merchandise may be further manipulated before withdrawal in cases where the collector is satisfied that this will not endanger the revenue or interfere with the efficient conduct of customs business. The merchandise remaining in the warehouse shall be properly repacked after each manipulation.

(g) Manipulated merchandise may be withdrawn under any form of withdrawal, but no withdrawal, shall be accepted for less than an entire repacked package. Each type of withdrawal filed shall contain a summary statement indicating the quantity in the warehouse account after manipulation and immediately before the withdrawal, the quantity withdrawn on the particular withdrawal, and the quantity remaining in the warehouse after the withdrawal. When merchandise covered by a consumption entry is manipulated elsewhere than in a bonded warehouse and thereafter withdrawn for consumption, the withdrawal shall be on customs Form 7505 and shall be liquidated in accordance with section 16.2(e). (Secs. 556, 562, 46 Stat. 743, 745, as amended; 19 U.S.C.A. 1556, 1562.)

FEDERAL STATUTE AND REGULATION UNDER WHICH NEW YORK AND CALIFORNIA EXPORT LIQUOR SELLERS' WAREHOUSES ARE CONDUCTED

19 U.S.C.A. 1311

All articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six: *Provided*, That the manufacture of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of law and of such regulations as shall be prescribed by the Secretary of the Treasury: *Provided further*, That the manufacture of distilled spirits from grain, starch, molasses, or sugar, including all dilutions or mixtures of them or either of them, shall not be permitted in such manufacturing warehouses.

Whenever goods manufactured in any bonded warehouse established under the provisions of the preceding paragraph shall be exported directly therefrom or shall be duly laden for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps.

No flour, manufactured in a bonded manufacturing

warehouse from wheat imported after ninety days after June 17, 1930, shall be withdrawn from such warehouse for exportation without payment of a duty on such imported wheat equal to any reduction in duty which by treaty will apply in respect of such flour in the country to which it is to be exported.

Any materials used in the manufacture of such goods, and any packages, coverings, vessels, brands, and labels used in putting up the same may, under the regulations of the Secretary of the Treasury, be conveyed without the payment of revenue tax or duty into any bonded manufacturing warehouse, and imported goods may, under the aforesaid regulations, be transferred without the exaction of duty from any bonded warehouse into any bonded manufacturing warehouse; but this privilege shall not be held to apply to implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein.

Articles or materials received into such bonded manufacturing warehouse or articles manufactured therefrom may be withdrawn or removed therefrom for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or ladening for transportation, as the case may be, describing the articles by their mark or otherwise, the quantity, the date of exportation, and the name of the vessel: *Provided*, That the by-products incident to the processes of manufacture, including

waste derived from cleaning rice in bonded warehouses under the Act of March 24, 1874, ch. 65, 18 Stat. 24, in said bonded warehouses may be withdrawn for domestic consumption on the payment of duty equal to the duty which would be assessed and collected by law if such waste or by-products were imported from a foreign country: *Provided*, That all waste material may be destroyed under Government supervision. All labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

A careful account shall be kept by the collector of all merchandise delivered by him to any bonded manufacturing warehouse, and a sworn monthly return, verified by the customs officers in charge, shall be made by the manufacturer containing a detailed statement of all imported merchandise used by him in the manufacture of exported articles.

Before commencing business the proprietor of any manufacturing warehouse shall file with the Secretary of the Treasury a list of all the articles intended to be manufactured in such warehouse, and state the formula of manufacture and the names and quantities of the ingredients to be used therein.

Articles manufactured under these provisions may be withdrawn under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: *Provided*, That cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses,

may be withdrawn for home consumption upon the payment of the duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe, and the payment of the internal-revenue tax accruing on such cigars in their condition as withdrawn, and the boxes or packages containing such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture.

The provisions of section 3433 of the Revised Statutes shall, so far as may be practicable, apply to any bonded manufacturing warehouse established under this chapter and to the merchandise conveyed therein.

Distilled spirits and wines which are rectified in bonded manufacturing warehouses, class six, and distilled spirits which are reduced in proof and bottled in such warehouses, shall be deemed to have been manufactured within the meaning of this section, and may be withdrawn as hereinbefore provided, and likewise for shipment in bond to Puerto Rico, subject to the provisions of this section, and under such regulations as the Secretary of the Treasury may prescribe, there to be withdrawn for consumption or be rewarehoused and subsequently withdrawn for consumption: *Provided,* That upon withdrawal in Puerto Rico for consumption, the duties imposed by the customs laws of the United States shall be collected on all imported merchandise (in its condition as imported) and imported containers used in the manufacture and putting up of such spirits and wines in such warehouses: *Provided further,* That no internal-revenue tax shall be imposed on distilled spirits and wines rectified in class six warehouses if such distilled spirits and wines are exported

or shipped in accordance with the provisions of this section, and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier.

MANUFACUTURING WAREHOUSES

TITLE 19, CODE OF FEDERAL REGULATIONS, CUSTOMS REGULATIONS, 19.13 CR 387-388

19.13 Requirements for establishment of warehouse. —(a) Buildings or parts of buildings and other enclosures may be designated as bonded manufacturing warehouses if the Bureau is satisfied that their location, construction, and arrangement afford adequate protection to the revenue. Such warehouses shall be used solely and exclusively for the purpose for which they are bonded. The general provisions pertaining to warehouses for the storage of bonded merchandise shall, so far as relevant, apply to bonded manufacturing warehouses.

(b) Application for the establishment of such a warehouse shall be made to the collector of customs for the port where the premises are situated, setting forth the size, construction, and location of the premises, the manufacture proposed to be carried on, and the kinds of materials intended to be stored and used therein.

(c) The procedure outlined in section 19.2 with respect to the application to bond the premises and the execution of the bond shall be followed.

(d) A list of all articles intended to be manufac-

tured in the warehouse shall be filed in duplicate with the collector of customs, who shall transmit one copy to the Bureau. Such list shall set forth the specific names under which the articles are to be exported and under which they will be known to the trade, and shall show the names of all the ingredients entering into the manufacture of such articles, with the quantities of such ingredients or materials as may be dutiable or taxable.

(e) Proprietors of such warehouses are required to conform strictly to the formulas filed with the bond, subsequently, and in no instance shall an article be permitted to be manufactured in or withdrawn from the warehouse which does not contain all the ingredients and in the quantities specified in the formula for the manufacture of such article, or which contains any ingredient not specified in the formula.

(f) Manufactured articles shall be marked with the trade name of the goods and may be marked, in addition, with the formulas and with such insignia or name as may be indicated or desired by the purchaser, if such additional marking will in no manner conflict with the requirements of the formula or present or create a false or misleading statement or impression.

(g) Each bonded manufacturing warehouse shall have a portion separated from the remainder of the premises and secured by customs locks to be used exclusively for the storage of all imported merchandise, domestic spirits, or other materials subject to internal-revenue tax transferred into such warehouse for manufacture. A like compartment shall be provided to be used exclusively for the storage of products manufactured in the warehouse. The premises shall be so se-

cured as to prevent any person from having access thereto in the absence of the customs warehouse officer in charge, and the goods stored therein shall be so arranged as to give all practicable convenience to such officer in making the required examination or taking samples for analysis. (sec. 311, 46 Stat. 691, as amended; 19 U.S.C. 1311.)

DEFINITION OF "COMMON CARRIER" AND REGULATIONS RELATING THERETO

TITLE 19, CODE OF FEDERAL REGULATIONS, 18.1, CR 363-364

18.1 Carriers; application to bond.—(a) Merchandise to be transported from one port to another in the United States in bond, except as provided for in paragraph (b), shall be delivered to a common carrier bonded for that purpose, but such merchandise may be transported with the use of the facilities of other bonded or nonbonded carriers. For the purposes of this section, the term "common carrier" means a common carrier of merchandise owning or operating a railroad, steamship, or other transportation line or route or a freight forwarder as defined in section 402 of part IV of the Interstate Commerce Act, as amended (49 U.S.C. 1002(a)(5)).

(b) Pursuant to Public Resolution 108, of June 19, 1936, and subject to compliance with all other applicable provisions of this part, the collector of customs at New York, upon the request of the party in interest, may permit merchandise entered and examined for customs purposes to be transported in bond between the ports named in the resolution by bonded cartmen or lightermen duly qualified in accordance with the provisions of part 21, if the collector is satisfied that the transportation of such merchandise in this manner will not endanger the revenue.

(c) A common carrier desiring to receive merchandise for transportation in bond shall file with the collector of customs a bond on customs Form 3587 in a sum to be recommended by the collector, accompanied

by the fee of $45 prescribed by section 24.12, a certified extract of its charter showing that it is authorized to engage in common carriage, and a statement that it is operating or intends to operate as a common carrier and that it undertakes to carry for such as choose to employ it and does not limit its carriage to specific individuals or firms. In addition to the foregoing a freight forwarder shall submit a certificate issued by the Interstate Commerce Commission showing that it is operating as a freight forwarder as defined in section 402 of part IV of the Interstate Commerce Act. The extract and statement need not be submitted in the case of railroad or steamship companies generally known to be engaged in common carriage.

(d) In the case of motor carrier bonds submitted for consideration, the following shall be filed in addition to the requirements mentioned above:

(1) A detailed description of the equipment to be used, showing whether the trucks are open or closed and whether they can be secured with customs seals, the number of trucks operated, and whether such trucks are owned or leased by the proposed bonded motor carrier, and, if leased, whether the trucks are operated by employees of the lessee or lessor.

(2) A list of the lines or routes over which the principal operates or will operate, setting out the cities or towns at which the trucks stop or lay over en route and where and in whose custody the trucks remain during such stops or lay-overs.

(3) A definite statement as to whether the principal transports merchandise according to schedule over each of the lines or routes named or performs carriage only when a shipment is secured for transportation.

(4) A detailed description of the terminal facilities employed by the principal at the points of origin and destination shown on the list of lines or routes.

(5) A statement showing that facilities are available for the segregation and safeguarding of the packages designated by the collector for examination from a particular shipment until such packages are called for by the public store cartman and removed to the public stores for examination.

(e) *Canadian and Mexican common carriers by motor vehicles may be bonded for the transportation of merchandise between two ports in Canada or Mexico through the United States.* (See section 5.11.)

(f) Common carrier bonds may be discontinued at any time by the Bureau or the collector of customs at the headquarters port where the bond is filed. Bonded carriers desiring to discontinue such bonds shall make application therefor to such collector. (Sec. 551, 46 Stat. 742, as amended; 49 Stat. 1538, 19 U.S.C. 1551, 1551a.)

49 U.S.C.A. 1002, SECTION (a), SUBSECTION (5)

INCORPORATED BY REFERENCE IN CUSTOMS DEFINITION OF "COMMON CARRIER"

The term "freight forwarder" means any person which (otherwise than as a carrier subject to chapter 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of

property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title.

DEFINITION OF EXPORTATION

TITLE 26, CODE OF FEDERAL REGULATIONS, EXPORTATION OF LIQUORS, SUBPART B, § 252.11

Exportation. A severance of goods from the mass of things belonging to the United States with the intention of uniting them to the mass of things belonging to some foreign country. The export character of any shipment shall be determined by the intention with which it is made, and it assumes an export character only when destined for use in a foreign country. For the purpose of this part, shipments to Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Panama Canal Zone shall be treated as exportations. Shipments to Kingman's Reef, the Midway Islands, or Wake Island are not exportations within the meaning of this part.

(48 Stat. 998-1003, as amended; 19 U.S.C. 81a-81u)

EVIDENCE OF EXPORTATION

TITLE 26, CODE OF FEDERAL REGULATIONS, EXPORTATION OF LIQUORS, SUBPART B, § 252.40

§ 252.40 Evidence of exportation.

The exportation of any shipment may be evidenced by:

(a) A copy of the export bill of lading (§ 252.250); or

(b) A copy of the railway express receipt (§ 252.251); or

(c) A copy of the air express receipt (§ 252.252); or

(d) A copy of the through bill of lading where exportation is to a contiguous foreign country (§ 252.250); or

(e) A certificate by the export carrier, as provided for in § 252.253.

(72 Stat. 1334, 1335, 1336, 1362, 1380; 26 U.S.C. 5053, 5055, 5062, 5214, 5362)

EXCERPT FROM BRIEF SUBMITTED BY PETITIONERS IN COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS AT AUSTIN, RAISING FEDERAL QUESTIONS

(4) The federal government has given to the states broader regulatory powers over alcoholic beverages than over any other item of commerce.

Presumably because of his mistaken beliefs that Appellees are "exporters" and that they are operating under procedures provided by federal law and customs regulations (both shown above to be erroneous), the trial court refused to consider the applicability of the Twenty-First Amendment to the statute in question. Even, however, if Appellees' procedure were in accordance with Customs regulations and even if Appellees could properly be considered to be exporters (neither proposition is admitted; both are specifically denied), the single fact that Appellees are dealing in alcoholic beverages might alone and in itself be sufficient to give the State of Texas the right to regulate and control their businesses. Section 2 of the Twenty-First Amendment reads:

> *"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."*

State laws dealing with alcoholic beverages are, therefore, in effect incorporated by reference into the Constitution of the United States. States may regulate

and control alcoholic beverages where they could not regulate or control any other item of commerce.

The situation is one of long standing. Even before national prohibition, Congress had by two major enactments delegated to the states full control and power to regulate liquor traffic. These enactments are the Wilson Act and the Webb-Kenyon Act. The Wilson Act, 27 U.S.C.A. 121 (26 Stat. 313) was not repealed by the Eighteenth Amendment and remains effective. Premier-Pabst Sales Company v. McNutt, 17 F.Supp. 708 (D.C. Ind., 1935).

The Webb-Kenyon Act (27 U.S.C.A. 122), was intended to be and is even broader than the Wilson Act. Originally passed on March 1, 1931 (37 Stat. 699), the Webb-Kenyon Act was re-enacted without change on August 27, 1935 (49 Stat. 877).

A leading case construing the two congressional enactments is *Clark Distilling Company v. Western Maryland Railway Company*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1916), where the Court said:

> "Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act if effect is to be given to its text, but operated so as to cause the prohibitions

of the West Virginia law against shipment, receipt, and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears, since, if that be not true, the coming into being of the act is wholly inexplicable."

At another point in its opinion the Court further explained:

". . . the Webb-Kenyon Act . . . did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.

"The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, *there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution; . . .*"

(5) The Twenty-first Amendment subordinated rights under the Commerce Clause to the power of a state to control and regulate liquor traffic within its borders.

In *State Board of Equalization of California v. Youngs Market Company,* 299 U.S. 59, 57 S. Ct. 77, 81 L. Ed. 38 (1936), the Supreme Court placed upon the Twenty-first Amendment much the same construction which had been given to the Webb-Kenyon Act. The Court said:

"The amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the amendment as saying, in effect: The state may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the amendment, but a re-writing of it."

Similarly Mr. Justice Frankfurter, in a concurring opinion in United States v. Frankfurt Distilleries, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945), pointed out:

"The Twenty-First amendment made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority. Before that Amendment —disregarding the interlude of the Eighteenth Amendment—alcohol was for constitutional purposes treated in the abstract as an article of commerce just like peanuts and potatoes. As a result, the power of the States to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause. The Twenty-first Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of a State to control, and to control effectively, the traffic in liquor within its borders."

At another point in the same opinion it is further explained that:

> "As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. *Its barrier may be low, high, or insurmountable.* Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues . . . the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, . . ."

To the same effect see *Ziffrin v. Reeves,* 308 U.S. 123, 60 S.Ct. 163, 84 L.Ed. 128 (1939); *Carter v. Commonwealth of Virginia,* 321 U.S. 131, 64 S.Ct. 464, 88 L.Ed. 605 (1944); *State of Georgia v. Wenger,* 94 F.Supp. 976 (D.C. Ill., 1951), affirmed 187 F.2d 285, certiorari denied 342 U.S. 822, 72 S.Ct. 41, 96 L.Ed. 621, rehearing denied 342 U.S. 874, 72 S.Ct. 105, 96 L.Ed. 657.